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No. 01-705

IN THE
Supreme Court of the United States

JO ANNE B. BARNHARDT, COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.
Respondents.

JO ANNE B. BARNHARDT, COMMISSIONER OF SOCIAL SECURITY,
Petitioner,
v.
BELLAIRE CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held that the Commissioner of Social Security lacked the authority to make initial assignments of beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, on or after October 1, 1993, when the statute explicitly provides that the Commissioner "*shall, before October 1, 1993*, assign each coal industry retiree who is an eligible beneficiary to a signatory operator * * * or any related person * * * which remains in business."

RULE 29.6 STATEMENT

Respondents Peabody Coal Company and Eastern Associated Coal Corp. are wholly-owned subsidiaries of Peabody Energy Corporation, a publicly held corporation.

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BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY COAL COMPANY AND EASTERN ASSOCIATED COAL CORP.

In the decisions below, the Sixth Circuit held that the Commissioner of Social Security lacked the authority under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, to make initial

assignments of beneficiaries to respondents on or after October 1, 1993. *See* Pet. App. 1a, 3a. The court's rulings rested on its earlier decision in *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999) (Pet. App. 27a), in which the court examined the "entire statutory scheme" and concluded that "Congress[] inten[ded] that all assignments be completed by October 1, 1993." Pet. App. 45a. In *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), a divided panel of the Fourth Circuit reached the opposite conclusion.

That conflict notwithstanding, the petition should be denied. As this Court has observed, the "decision to grant certiorari represents a commitment of scarce judicial resources." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985). And "it is certainly safe to assume that whenever [the Court] grant[s] certiorari in a case not deserving plenary review, [it] increase[s] the likelihood that certiorari will be denied in other, more deserving cases." *Watt* v. *Alaska*, 451 U.S. 259, 274 n.1 (1981) (Stevens, J., concurring). Such would be the result if the Court were to grant certiorari here.

The conflict between the Sixth and Fourth Circuits is not dire. Regardless of whether assignments made on or after October 1, 1993, are valid, retired coal mine workers and their dependents will continue to receive the same benefits they have been receiving all along. At the same time, the Combined Fund does not stand to lose a single dollar in net revenue. And because the Fund is of limited duration, the conflict will not have any lasting impact.

Moreover, the Sixth Circuit's interpretation of the Coal Act is correct. Should the Court decline to review the question presented, either now or after other circuits have expressed their views, the Commissioner may well implement the Sixth Circuit's decisions on a nationwide basis. Thus, the denial of certiorari could lead in any event to the result Congress

intended. This Court should reserve its scare resources for another case truly deserving of review.

STATEMENT OF THE CASE

In enacting the Coal Act, Congress's overriding concern was the continued provision of health benefits to retired mine workers. For years, retiree health benefits had been provided through multi-employer health plans established pursuant to collective bargaining agreements negotiated by the United Mine Workers of America and the coal industry. The plans were funded by contributions from coal operators, and continued to provide benefits to eligible retirees even after their former employers went out of business or otherwise stopped contributing to the plans. Such benefits were financed by the remaining participating coal operators, even though those operators and the retirees whose benefits they financed may never have had an employment relationship.

By the late 1980s, the plans had run into serious financial trouble as health care costs increased and coal operators stopped contributing to the plans because they no longer employed union employees or had left the coal business altogether. Congress responded by enacting the Coal Act, in which Congress declared its policy to be "to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry," "to allow for sufficient operating assets for such plans," and "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Pub. L. No. 102-486, § 19142(b)(1)-(3), 106 Stat. 3037. To accomplish those objectives, the Coal Act merged the existing multi-employer plans (the 1950 and 1974 UMWA Benefit Plans) into a new private multi-employer plan known as the United Mine Workers of America Combined

Benefit Fund (the "Combined Fund"). *See* 26 U.S.C. § 9702(a)(1)(2).

The Combined Fund provides "substantially the same" health benefits that retirees and their dependents received under the 1950 and 1974 plans to each "eligible beneficiary." *Id.* at § 9703(b)(1).[1] An "eligible beneficiary" is defined as a coal industry retiree who, on July 20, 1992, was receiving benefits under the 1950 or 1974 plan, or an individual who, on such date, was receiving such benefits by reason of a relationship to such a retiree. *Id.* at § 9703(f)(1)(2). Coal industry workers retiring after July 20, 1992, are not eligible for benefits under the Fund. Thus, at its inception, the Combined Fund had a fixed number of beneficiaries which would continue to decline over the life of the Fund.

The Combined Fund is financed in part by annual premiums assessed against "assigned operators," *i.e.*, coal operators which signed a coal wage agreement requiring the provision of health benefits to retirees or contributions to the 1950 or 1974 plans, and which "conduct[] or derive[] revenue from any business activity, whether or not in the coal industry." *Id.* at §§ 9701(b)(1), (c)(1), (5), (7), 9704(a), 9706(a). If an assigned operator is no longer involved in any business activity, premiums may be assessed against "related persons," including businesses or corporations under common control. *Id.* at §§ 9701(c)(2)(A), 9706(a). Assigned operators (and related persons) are assessed annual premiums for each retiree (and their dependents) assigned to them under a three-tier allocation system set out in the Coal Act. *Id.* at §§ 9704(a)(1), 9706(a)(1)-(3). So that assignments would be completed

[1] Because the vast majority of beneficiaries are also eligible for the federal Medicare program, the Combined Fund essentially functions as a "Medigap" policy, providing prescription drugs and other benefits not available under Medicare.

before the beginning of the plan's first full year commencing October 1, 1993, *see id.* at § 9702(c), Congress specifically directed that "the Commissioner of Social Security *shall*, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business." *Id.* at § 9706(a) (emphasis added).[2]

To ensure the assignment of beneficiaries by the statutory deadline, Congress directed the 1950 and 1974 plans to provide to SSA within 20 days of the statute's enactment a list of the names and social security numbers of each eligible beneficiary (including each deceased beneficiary if any other individual was a beneficiary by reason of a relationship to such deceased beneficiary) and, to the extent possible, the names of their former employers. *See id.* at § 9706(c). Congress also directed all other agencies to cooperate fully with SSA in providing information which would enable SSA to complete the assignment process. *See id.* at § 9706(d). As the Government explains, at the outset, approximately 80,000 retirees needed to be assigned. *See* Pet. 8 n.4. Members of the Bituminous Coal Operators' Association subsequently provided SSA with a list of coal operators who voluntarily acknowledged responsibility for about 15,000 retirees. *Id.*

That left SSA with about 65,000 retirees to assign. Because only those retirees (and their dependents) actually receiving benefits under the 1950 and 1974 plans as of July 20, 1992, were eligible for enrollment in the Combined Fund, *see* 26 U.S.C. § 9703(e), the identity of those retirees

[2] The Coal Act was enacted on October 24, 1992. *See* note following 26 U.S.C. § 9701. The Social Security Administration ("SSA") thus had nearly a full year to complete the assignment process. Financing for the Combined Fund's first plan year, which ran from February 1, 1993 to September 30, 1993, was provided by other sources. *See* Pet. 8 n.3.

was known to SSA at the start of the assignment process. Not surprisingly, then, on September 9, 1993—only weeks before the statutory deadline—the then-Acting Commissioner of SSA informed a congressional committee that SSA "[was] making excellent progress with the assignment process," and that SSA "fully expect[ed] [to] meet [its] statutory responsibility to * * * complete the assignment process by October 1, 1993." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Ways and Means Comm.*, 103d Cong. 26 (1993) (statement of Acting Social Security Commissioner Lawrence H. Thompson).

Congress recognized that not all beneficiaries could be assigned under the criteria set out in the Act. The statute thus contemplates that such beneficiaries would be considered "unassigned," *see* 26 U.S.C. § 9704(a)(3), (d),[3] and designates sources of financing for their health benefits. For each of the plan's first three years, Congress directed that $70 million be transferred from the 1950 UMWA Pension Plan, and that a portion of those transfers be used to finance the health benefits of unassigned beneficiaries. *See id.* at § 9705(a)(1), (3). For each plan year thereafter, Congress authorized the annual transfer of interest earned by the Department of the Interior's Abandoned Mine Reclamation Fund (the "AML Fund") to be used to finance the health benefits of unassigned beneficiaries. *See id.* at

[3] The Act does not explicitly state that beneficiaries not assigned by October 1, 1993, are deemed "unassigned." Nor does the Act explicitly state that beneficiaries not assigned under the statute's three-tier allocation system are deemed "unassigned." Yet in providing for an "unassigned beneficiaries premium," 26 U.S.C. § 9704(d), and in designating sources of financing to reduce that premium, *id.* at §§ 9704(a)(3), 9705(a)(1), (3), (b)(1), (2), Congress clearly anticipated that there would be beneficiaries who could not be assigned in accordance with the Act's criteria.

§ 9705(b)(1), (2); 30 U.S.C. § 1232(h).[4] To the extent such transfers prove insufficient to cover the costs of providing health benefits to unassigned beneficiaries, the Act provides for the assessment of an unassigned beneficiaries premium against each assigned operator based on its proportionate share of assigned beneficiaries. 26 U.S.C. § 9704(a)(3), (d). To date, such transfers have been sufficient, and assigned operators have never been assessed an unassigned beneficiaries premium.

REASONS FOR DENYING THE WRIT

I. THE CONFLICT BETWEEN THE DECISIONS OF THE SIXTH AND FOURTH CIRCUITS DOES NOT WARRANT THIS COURT'S REVIEW.

1. The conflict between the decisions below and the decision issued by a divided panel of the Fourth Circuit in *Pardee* does not warrant this Court's review. Under either court's interpretation of the Coal Act, coal industry retirees (and their dependents) will continue to receive the same health benefits they have been receiving under the Combined Fund. Indeed, beneficiaries deemed "unassigned" under the Sixth Circuit's decisions will be entitled to the same benefits they would have received had they been "assigned." *See id.* at § 9703(a). Thus, the conflict in no way undermines Congress's primary objective in enacting the Coal Act—the continued provision of health benefits to retired mine workers. *See supra* at 3. Accordingly, there is no compelling need in this case for this Court's intervention.

[4] Such transfers may not exceed actual expenditures on behalf of unassigned beneficiaries. *See* 30 U.S.C. § 1232(h)(3)(A). To the extent interest earned by the AML Fund in any fiscal year is less than $70 million, Congress has authorized the transfer of interest earned by the Fund between September 30, 1992, and October 1, 1995, to make up the difference. *See id.* at § 1232(h)(2)(A), (B), (3)(B).

The Government contends that review is necessary because the Sixth Circuit's interpretation of the Coal Act "threatens to erode the financial stability of the Combined Fund." Pet. 24. To the contrary, the Combined Fund does not stand to lose *any* net revenue as a result of the Sixth Circuit's decisions, even if implemented on a nationwide basis. Congress has designated two sources of financing for the health benefits to unassigned beneficiaries: (1) a portion of the $210 million in transfers from the 1950 UMWA Pension Plan, and (2) for plan years beginning on or after October 1, 1995, annual transfers of interest earned by the AML Fund. *See* 26 U.S.C. § 9705(a)(1), (3), (b)(1), (2); 30 U.S.C. § 1232(h). Since the enactment of the Coal Act, those transfers have been sufficient to cover the costs of providing health benefits to unassigned beneficiaries, and they should continue to prove sufficient to do so as the overall beneficiary population continues to decline.[5]

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[5] The Government suggests that transfers from the AML Fund may not be sufficient to cover such costs in the future as a result of falling interest rates and rising health care costs. *See* Pet. 27 & n.20. But such trends (assuming they persist) are likely to be offset by the continuing and rapid decline of the beneficiary population. At its inception, the Combined Fund had approximately 114,000 beneficiaries. Pet. 25 & n.17. According to information contained in recent invoices and worksheets sent out by the Fund, as of October 2001, the Fund had approximately 54,000 beneficiaries—less than half the number it had only nine years ago. *See also* 146 Cong. Rec. S3835 (May 10, 2000) (statement of Sen. Rockefeller) ("There are now only about 65,000 miners and retirees remaining in the [Combined] Fund * * *. Their average age is 78 years old, and more than 45% of the population is over 80 years."). And although the Government contends (Pet. 25-26) that the invalidation of assignments made after the statutory deadline could require the Combined Fund to issue refunds of premiums collected in prior years, there is no indication in the petition that transfers from the AML Fund cannot make up the difference.

The Sixth Circuit's decisions thus hardly threaten the Fund's financial collapse.[6]

The Government also contends (Pet. 24) that review is warranted because other assigned operators may be required to absorb some of the costs of providing benefits to beneficiaries who were assigned on or after October 1, 1993. To date, however, assigned operators have never been assessed

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The Government also suggests (Pet. 27-28) that it would be inappropriate to use transfers from the AML Fund to finance the provision of health benefits to beneficiaries who could not be assigned by October 1, 1993, because that fund was established for other purposes. But the transfers authorized under the Coal Act are transfers of *interest* earned by the AML Fund, and thus do not jeopardize the fund's viability. And, in any event, Congress has determined that such transfers are an appropriate source of financing for the Combined Fund.

[6] Although the Government suggests (Pet. 26-27 n.20) that the Sixth Circuit's decisions will exacerbate operating shortfalls the Combined Fund is apparently expected to encounter in future years, an increase in the number of unassigned beneficiaries would actually have no effect on such shortfalls, since the Coal Act provides for the financing of health benefits for unassigned beneficiaries. In fact, the Combined Fund realizes a net gain when an assigned beneficiary is allocated to the unassigned beneficiary pool, because transfers from the AML Fund have covered actual *expenditures* on behalf of unassigned beneficiaries, not just premiums. *See* Office of Surface Mining Reclamation and Enforcement, United States Dep't of Interior, *Memorandum of Understanding Between the Office of Surface Mining Reclamation and Enforcement of the United States Dep't of Interior and the United Mine Workers of America Combined Benefit Fund* 4 (Nov. 6, 1996). To the extent the Combined Fund experiences operating shortfalls, it is because actual expenditures on behalf of *assigned* beneficiaries exceed premiums collected on their behalf. *See* Letter from Gloria L. Jarmon, United States General Accounting Office, to the Honorable William V. Roth, Jr. 3 (Table 1) (Aug. 31, 2000).

an unassigned beneficiaries premium. And even if they were required to shoulder some of those costs, that would hardly necessitate this Court's review. The Coal Act does not create a scheme of perfect symmetry in which companies are required to finance the costs of providing benefits to only those beneficiaries with whom they had a former employment relationship or for whose benefits they are most responsible. Instead, Congress established a scheme where a coal operator that only briefly employed a retiree who worked much longer for another coal operator might be responsible for that retiree (and his dependents), *see* § 9706(a); where companies that never employed a retiree or even engaged in the coal mining business might be responsible for retirees, *see* §§ 9701(c)(2)(A), 9706(a); and where companies might be responsible for a portion of the costs of providing benefits to retirees who could not be assigned to anyone else. *See* § 9704(a)(3), (d). Requiring assigned operators to bear a portion of the costs of providing benefits to beneficiaries who could not be assigned by October 1, 1993, is consistent with this "rough justice" approach. *See Pardee*, 269 F.3d at 439 (Niemeyer, J., dissenting) (criticizing majority for "seek[ing] to adjust the financial equities of the Coal Act by judicial mandate").[7]

The relatively insignificant and declining number of beneficiaries implicated by the conflict also makes this case an unattractive candidate for certiorari. As the Government explains (Pet. 24-25), approximately 7,500 retirees were initially assigned by SSA after the statutory deadline.

[7] It is by no means certain that the invalidation of assignments made on or after October 1, 1993, would necessarily result in a "windfall" for an operator whose assignments are invalidated. *See* Pet. 23. If an unassigned beneficiaries premium is assessed against assigned operators, it is conceivable that some operators whose assignments were invalidated would be required to pay more to the Fund than they would if assignments made after the statutory deadline were valid.

Assuming that the number of those beneficiaries has declined at the same rate as the general beneficiary population, less than 3,750 of those retirees are still receiving benefits under the Fund. Even if the Government is correct that each retiree assigned under the Coal Act accounts for approximately 1.4 beneficiaries, *see* Pet. 25 n.17, that means that only about 5,250 beneficiaries assigned after October 1, 1993, are still receiving benefits under the Combined Fund—less than 10% of the Fund's current beneficiaries. *See supra* at 8 n.5. And many of those beneficiaries may be rendered "unassigned" in any event as a result of this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). *See* Pet. 6 n.1; *Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Government Oversight, Management, and Restructuring, and the District of Columbia of the Senate Governmental Affairs Comm.*, 105th Cong. 62-63 (1998) (statement of Marilyn O'Connell, SSA Associate Commissioner for Program Benefits) (as of October 1998, over 6,000 assigned retirees redesignated as "unassigned" as a result of *Eastern Enterprises* decision).[8]

In short, the conflict between the decisions of the Sixth and Fourth Circuits is certainly one the Nation and this Court can tolerate. The conflict does not concern issues of constitutional importance like those involved in *Eastern Enterprises*, where the Court concluded that the assignment of retirees under the third tier of the Coal Act's allocation system placed a "severe, disproportionate, and extremely retroactive burden" on assigned operators. 524 U.S. at 538. Quite the opposite. The conflict merely concerns an issue of statutory interpretation that does not hinder the effective administration of the statute, does not unfairly burden private parties, and does not promise to be one of continuing importance.

[8] Indeed, as the Government notes (Pet. 12 n.8), all of the 50-plus assignments challenged in *Dixie Fuel* were subsequently voided as a result of *Eastern Enterprises*.

2. Even if the conflict somehow merited this Court's attention, there is no need for the Court to intervene now. To begin with, the Court can wait and see if any of the dire consequences envisioned by the Government indeed come to pass. As discussed further below, there are a number of cases in the lower courts raising the question presented which could provide the Court with the opportunity to visit the issue at a later date. Moreover, should the Court deny certiorari at this time, it is entirely possible that the conflict will resolve itself.

The current conflict exists only between the Sixth and the Fourth Circuits. At the time the Sixth Circuit decided *Dixie Fuel*—and at the time the Sixth Circuit denied initial hearing en banc in the decisions below, *see* Pet. 15—the court did not have the Fourth Circuit's decision in *Pardee* before it. Moreover, other circuits will continue to weigh in on the question presented, making it possible that either the Sixth or Fourth Circuit will reconsider its ruling. In fact, the Third Circuit recently heard argument in a case concerning the question presented, and a decision should issue soon. *See Shenango, Inc.* v. *Commissioner of Soc. Sec.*, No. 00-2525 (3d Cir.) (argued Sept. 19, 2001).[9]

At the very least, denying certiorari now would allow further development of the law, which would benefit this Court

[9] Other circuits are also likely to weigh in, as the Coal Act provides that venue is appropriate in "the district where the plan is administered or where a defendant resides or does business." 29 U.S.C. § 1451(d). *See* 26 U.S.C. § 9721 (stating that "[t]he provisions of section 4301 of [ERISA] shall apply to any claim arising out of an obligation to pay any amount required to be paid" under the Coal Act). The "district where the plan is administered" is the District of Columbia. *See Holland* v. *King Knob Coal Co.*, 87 F. Supp. 2d 433, 440 (W.D. Pa. 2000). At least two cases raising the question presented are pending in that district. *See Nell Jean Indus., Inc.* v. *Barnhardt*, No. 01-CV-2006 (D.D.C.); *Elgin Nat'l Indus.* v. *Halter*, No. 01-CV-397 (D.D.C.).

should it decide to take up the question presented at a later date. *See, e.g.*, *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

II. THE SIXTH CIRCUIT'S INTERPRETATION OF THE COAL ACT IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

The Sixth Circuit's interpretation is correct and consistent with this Court's precedents. If left to stand, the Sixth Circuit's decisions—which give effect to Congress's intent—may well be implemented by SSA on a nationwide basis, thereby mooting the conflict as a practical matter.

This Court has held that if a statute does not specify a consequence for an agency's noncompliance with a statutory deadline, federal courts will not in the ordinary course conclude that an agency lacks authority to act beyond the deadline. *See, e.g.*, *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). At the same time, however, this Court has specifically declined to hold that the consequence of noncompliance must be stated *explicitly* in the statute. *See Brock* v. *Pierce County*, 476 U.S. 253, 262 n.9 (1986). Indeed, in determining whether an agency may act outside statutorily prescribed limits, the Court has looked to "normal indicia of congressional intent." *Id.* *See also James Daniel Good*, 510 U.S. at 65 (examining structure of timing provisions in statute); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 719 (1990) (examining design and function of statute).

As the Sixth Circuit recognized in *Dixie Fuel*, "the entire statutory scheme for assigning beneficiaries and financing the Combined Benefit Fund reflects Congress's intent that all assignments be completed by October 1, 1993." Pet. App.

45a. For instance, as discussed, the Act contemplates that beneficiaries who could not be assigned under the criteria set out in the Act would be considered "unassigned." *See supra* at 6. Moreover, as the Sixth Circuit explained, "the calculation of the obligation of every assigned operator for payment of unassigned beneficiary premiums is dependent upon the completion of the assignment of beneficiaries by October 1, 1993." Pet. App. 47a. The Government argues that each assigned operator's proportionate share of unassigned beneficiaries is "not fixed in concrete," but rather subject to adjustment to reflect "changed circumstances." Pet. 21. But the Coal Act specifies only *two* circumstances requiring the redetermination of an assigned operator's proportionate share for plan years beginning on or after October 1, 1994: (1) where changes in assignments occur as a result of the appeals process set out under § 9706(f), and (2) where an assigned operator or related person ceases to do business. 26 U.S.C. § 9704(f)(2)(A), (B). Nowhere does the Act state that an assigned operator's proportionate share may be adjusted to reflect the initial assignment of beneficiaries after October 1, 1993, for the simple reason that the Act does not contemplate initial assignments after that date. Rather, the Act plainly contemplates that beneficiaries who could not be assigned by October 1, 1993, would be considered "unassigned." That is "[t]he consequence flowing from the failure of [SSA] to make those assignments before October 1, 1993." Pet. App. 47a.

It is no answer that Congress did not *explicitly* state that beneficiaries who could not be initially assigned by that date would be considered "unassigned." Congress did not explicitly state that beneficiaries who could not be assigned under the Act's three-tier allocation system would be deemed "unassigned" either, but no one would argue otherwise. That is because Congress clearly anticipated that some beneficiaries would be unassigned and made provisions for them. *See* 26 U.S.C. § 9704(a)(3), (d). Thus, the most natural

reading of the statute is that beneficiaries who could not be assigned under the Act's three-tier system by October 1, 1993, are deemed "unassigned." Such a deadline makes sense, because Congress may not have wanted SSA to go to extraordinary lengths in an attempt to assign every single beneficiary—particularly under a statutory scheme already suffused with concepts of rough justice. Even though Congress may have hoped to identify the "persons most responsible for plan liabilities," Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037, Congress may have decided that if it were too difficult to do so in each case by the statutory deadline, then the trouble of making such assignments would not be worth the further expenditure of public resources beyond that date.[10]

The Government's arguments to the contrary cannot withstand scrutiny. For instance, the Government argues (Pet. 17-18) that the Coal Act cannot be read to divest the Commissioner of authority to make initial assignments after October 1, 1993, because the statute does not impose a "consequence" upon SSA for failing to complete assignments by that date. According to the Government, no "punishment" for missing the statutory deadline could be visited upon SSA because the agency does not "enforce" the Act. Pet. 17. But this Court's precedents do not hold that an agency must be "punished" for missing a deadline, only that the statute must specify the consequence of the agency's failure to act within the time prescribed. Here, that consequence is quite clearly

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[10] Although the Government points out that Congress provided in a supplemental appropriation for SSA that the amount would remain available "until expended," Pet. 20, that appropriation was intended to enable SSA not only to make initial assignments, but also to "calculate the initial health-benefit premium" and to "review assignments on requests for reconsideration," Pet. 9, endeavors which—unlike making initial assignments—would continue past the statutory deadline.

treating those not assigned by the statutory deadline pursuant to the express rules for unassigned beneficiaries.

The Government also argues (Pet. 18) that the Sixth Circuit's reading of the Coal Act has adverse consequences for the AML Fund and other assigned operators. As discussed, however, Congress has limited annual transfers from the AML Fund to *interest* earned by the fund, and such transfers do not pose any threat to the fund's viability. And if such transfers continue to prove sufficient to cover the costs of providing health benefits to unassigned beneficiaries, then assigned operators will not be assessed an unassigned beneficiaries premium. But even if such transfers were to prove insufficient, it would not be overly burdensome to require other assigned operators to bear a portion of those costs. *See supra* at 9-10.

The Government further contends (Pet. 19) that the Sixth Circuit's reading of the Coal Act is inconsistent with Congress's decision to impose liability on "related persons." According to the Government, that aspect of the statutory scheme required SSA "to trace many complex changes in business ownership and control," and information was not available from a "single, central depository," but rather was "pieced together" from several sources. *Id.* Thus, the Government concludes, "[i]t is scarcely conceivable that Congress would have imposed an absolute 'jurisdictional' bar on the ability of [SSA] to complete that undertaking when, in a significant number of cases, decisions depended on information that was not within [SSA's] possession when the Coal Act was passed." *Id.* But that argument in fact proves too much. Congress's decision to impose liability on related persons demonstrates that it was willing to impose liability on entities even if they were not the "persons most responsible for plan liabilities." Pub. L. No. 102-486, § 19142(a)(2), 106 Stat. 3037. Moreover, as discussed, Congress may have decided that if certain assignments were too difficult to complete—because, for example, they required SSA "to trace many complex changes in business ownership and control"—by October 1, 1993, then further resources should not be expended.

Finally, the Government asserts (Pet. 21) that to the extent the Coal Act is ambiguous, SSA's interpretation of the statute is entitled to deference. Even if the Act were ambiguous—which it is not—no deference should be accorded SSA's interpretation. Not only is the statutory text devoid of support, but the agency's interpretation of the Act is directly at odds with its original understanding of its statutory mandate—that initial assignments had to be completed by October 1, 1993.

In SSA's only Coal Act rulemaking in 1993, the agency described its mission as a "one-time assignment activity which *must* be completed before October 1, 1993." 58 Fed. Reg. 52,914, 52,914 (Oct. 13, 1993) (emphasis added). In June 1995, the Principal Deputy (and former Acting) Commissioner of SSA informed a congressional oversight committee that SSA had "carried out [its] responsibilities of calculating the premiums and the initial assignment to the mine operators in the timeframe contemplated by the statute." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 20 (1995) (statement of Principal Deputy Commissioner Lawrence H. Thompson).

The agency's shifting position on its authority under the Coal Act is not entitled to deference. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation * * * which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt* v. *Alaska*, 451 U.S. at 273).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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REPLY

BRIEF